Comment

H.J. Inc.: Targeting Federal RICO's Pattern Requirement to Long-Term Organized Criminal Activity

On June 26, 1989, the Supreme Court issued yet another statement on the federal Racketeer Influenced and Corrupt Organizations (RICO) Act: *H.J. Inc. v. Northwestern Bell Tel. Co.*[1] Led by Justice Brennan, the five-member majority instructed the lower courts as to what a "pattern of racketeering activity" did *not* entail. Additionally, the justices endeavored to explain in extremely general terms what they believed the term did require. Almost immediately, a host of opinions appeared from the federal judiciary trying to apply this new decree to the myriad of RICO cases before them. This Comment will review federal and state case law pertaining to RICO's pattern requirement prior to H.J. Inc., examine this recent pronouncement of the Supreme Court, and organize the numerous decisions appearing on this issue in an attempt to provide consistency and uniformity to this elusive concept.

I. Introduction to Federal RICO

In 1970, Congress adopted federal RICO,[2] largely to promote the eradication of organized crime nationwide.[3] Towards this end, severe criminal penalties[4] and a broad venue and process provision[5] were provided. Section 1962 of RICO, entitled "Prohibited Activities," defines four specific offenses: (a) the use of income derived from a pattern of racketeering activity to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; (b) the acquisition or maintenance of any interest in an enterprise through a pattern of racketeering activity; (c) the conduct or participation in the conduct of an enterprise through a pattern of racketeering activity; and (d) conspiring to violate any of these provisions.[6] All four of the prohibited activities operate upon the same set of definitions.[7] These terms are decidedly broad so as "to avoid creating loopholes for clever defendants and their lawyers."[8]

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1. 109 S. Ct. 2893 (1989).

2. 18 U.S.C. §§ 1961-68 (1988). Adopted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

3. Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452 § 1, 84 Stat. 922, 923, 1970 U.S. Code Cong. & Admin. News 1073. *See also H.J. Inc.*, 109 S. Ct. at 2903; Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 513-23 (1985) (Marshall, J., dissenting); Russello v. United States, 464 U.S. 16, 26 (1983); United States v. Turkette, 452 U.S. 576, 591 (1981).

4. 18 U.S.C. § 1963 (1988).

5. *Id.* at § 1965.

6. *Id.* at § 1962. *See Sedima*, 473 U.S. at 482-83; *H.J. Inc.*, 109 S. Ct. at 2897.

7. 18 U.S.C. § 1961 (1988).

8. Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 390 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985) (per curiam). *See Russello*, 464 U.S. at 21 (noting "the pattern of the RICO statute in utilizing terms and concepts of breadth"); *H.J. Inc.*, 109 S. Ct. at 2905 ("Congress drafted RICO

The most commonly invoked provision of RICO is Section 1962(c).[9] The essential elements consist of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[10] Those persons[11] employed by or associated with such an enterprise are criminally and civilly liable for conducting or participating, directly or indirectly, in the enterprise's affairs.[12] The first element, conduct, is not, for all practical purposes, a limiting term and "simply means the performance of activities necessary or helpful to the operation of the enterprise."[13] An enterprise is broadly defined in the statute[14] and covers essentially any union or group of individuals associated in fact.[15] Perhaps the most concrete term is racketeering activity, which describes any act chargeable or indictable under certain federal and state criminal offenses specified in the statute.[16] These acts are commonly called predicate offenses. The final element, a pattern of racketeering activity, will be discussed at length in this Comment.

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broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways"); Delta Truck & Tractor, Inc. v. J.I. Case Co., 855 F.2d 241, 242 (5th Cir. 1988) ("Congress wrote RICO in broad, sweeping terms to combat the many, varied, anfractuous ways in which racketeers operate"), *cert. denied*, 109 S. Ct. 1531 (1989). Congress expressly declared that RICO "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4036. *See Sedima*, 473 U.S. at 497-98.

9. 18 U.S.C. § 1962(c) (1988) states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

10. *Sedima*, 473 U.S. at 496.

11. As defined in RICO, a " 'person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1988). One circuit has required that "the RICO person must be one that either poses or has posed a continuous threat of engaging in acts of racketeering." *Delta Truck*, 855 F.2d at 242. *See also* Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 425 (5th Cir. 1990).

12. 18 U.S.C. § 1962(c) (1988). *See* United States v. Salerno, 868 F.2d 524, 533 (2d Cir. 1989) (necessary connection between person and enterprise is established if enterprise enables defendant to commit predicate acts or otherwise relates to these offenses); United States v. Marren, 890 F.2d 924, 932-33 (7th Cir. 1989) (individual is subject to RICO for knowingly participating in the commission of two predicate acts); Gussin v. Shockey, 725 F. Supp. 271, 277 (D. Md. 1989) (defendant must associate himself with the enterprise with a purpose to violate the act); Casperone v. Landmark Oil & Gas Corp., 819 F.2d 112, 115 (5th Cir. 1987) (defendant need not personally commit the predicate acts provided evidence is sufficient to connect him to fraudulent scheme).

13. Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 970 (11th Cir. 1986) (citing United States v. Martino, 648 F.2d 367 (5th Cir. 1981), *aff'd on other grounds sub nom.* Russello v. United States, 464 U.S. 16 (1983)).

14. 18 U.S.C. § 1961(4) (1988) states: " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *See* United States v. Turkette, 452 U.S. 576, 580-87 (1981).

15. In *Turkette*, 452 U.S. at 580-81, the Court expressly held that enterprises include both legitimate and illegitimate entities. An enterprise may consist of a number of otherwise separate and distinct entities where they have been connected by a pattern of racketeering activity. United States v. Stolfi, 889 F.2d 378, 380 (2d Cir. 1989). Courts generally require that the defendant/person be separate and distinct from the enterprise and individually identified in the pleadings. *Landry*, 901 F.2d at 425; Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1489 (6th Cir. 1989) (listing cases); Elliott v. Foufas, 867 F.2d 877, 881 (5th Cir. 1989). This does not mean, of course, that such a person cannot be a member of the illegal enterprise. Cullen v. Margiotta, 811 F.2d 698, 729-30 (2d Cir. 1987); Benard v. Hoff, 727 F. Supp. 211, 214-15 (D. Md. 1989). In contrast to subsection (c) of section 1962, subsection (a) allows an enterprise alone to be held liable regardless of whether a separate person exists. Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990). Similarly, a RICO action may be maintained under subsection (b) of section 1962 even though a distinct person apart from the enterprise has not been identified. *Landry*, 901 F.2d at 425.

16. 18 U.S.C. § 1961(1) (1988). *See Sedima*, 473 U.S. at 481-82.

To supplement criminal enforcement of RICO's prohibitions, Congress provided a civil cause of action in Section 1964(c) for those persons whose business or property had been injured by a violation of RICO.[17] Treble damages, costs, and attorney fees were guaranteed to those who could successfully establish a claim for relief.[18] A civil plaintiff may procure these generous awards once the necessary elements are established by a mere preponderance of the evidence.[19]

This extraordinary civil remedy was included in RICO after astonishingly little debate.[20] Senator McClellan, a prominent sponsor of the bill, believed this civil remedy would become "a major new tool in extirpating the baneful influence of organized crime in our economic life."[21] To some members of Congress, however, the statute's potentially far-reaching applications were readily apparent.[22]

Although difficult to quantify, federal RICO suits have unquestionably had a substantial impact upon U.S. jurisprudence. Some commentators have expressed dismay at the statute's continually broadening scope and the exotic applications it has fostered.[23] Others have offered dire predictions of a crippling overload of the federal judiciary as a result of increasing RICO litigation.[24] Certainly, invocation of civil RICO against the traditional professional criminal is now the exception and not the rule.[25] However, a strong argument exists that RICO claims produce relatively few "wholly new pieces of litigation" as they are typically appended to complaints already based upon a number of independent theories of relief.[26] Nevertheless, federal RICO is frequently applied in a wide variety of legal fields and shows no signs of abatement.

II. THE PATTERN REQUIREMENT BEFORE *SEDIMA*

Perhaps the knottiest element of a RICO case is the pattern requirement. This evasive concept is a necessary element of any claim under the statute.[27] It ensures that RICO is not employed against the isolated or sporadic offender and thus protects the "ordinary run of commercial transactions" and avoids complete preemption of state criminal laws.[28]

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17. 18 U.S.C. § 1964(c) (1988).

18. *Id.*

19. *Sedima*, 473 U.S. at 491-93.

20. *Id.* at 507 (Marshall, J., dissenting); 132 CONG. REC. H9371 (daily ed. Oct. 7, 1986) (remarks of Representative Boucher).

21. 116 CONG. REC. 25, 190 (1970). *See also* 116 CONG. REC. 35, 295 (1970) (remarks of Representative Poff).

22. 116 CONG. REC. 35, 204 (1970) (remarks of Representative Mikva).

23. P. BATISTA, CIVIL RICO PRACTICE MANUAL 1-2 (1987).

24. 132 CONG. REC. H9371 (daily ed. Oct. 7, 1986) (remarks of Representative Boucher); *id.* at H9374 (remarks of Representative Feighan). *But see* J. RAKOFF & H. GOLDSTEIN, RICO CIVIL AND CRIMINAL LAW STRATEGY § 2.03[1], at 2-20 (1989) (arguing that the expected deluge of RICO filings never materialized).

25. *Sedima*, 473 U.S. at 499 n.16 (citing ABA Task Force Report).

26. Blakey, *The Origin and Promise of Civil RICO*, in CIVIL RICO: A PRACTITIONER'S GUIDE TO THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATION LITIGATION A-7-8 (1988).

27. *H.J. Inc.*, 109 S. Ct. at 2897; *Sedima*, 473 U.S. at 496 & n.14. "The articulation of a coherent definition of 'pattern' is essential to the rational development of RICO law." Medallion Television Enter. v. SelecTV, 833 F.2d 1360, 1363 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 3241 (1989).

28. Menasco, Inc. v. Wasserman, 886 F.2d 681, 683 (4th Cir. 1989).

To establish a violation of Section 1962, a plaintiff or prosecutor must demonstrate that a pattern of racketeering exists.[29] The statutory definition provides that:

> "[P]attern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.[30]

Prior to 1985, judicial analysis of this term was rare and generally undertaken only in criminal cases.[31] In the broadest readings published, several courts required only the commission of two or more predicate offenses that related to or had an impact upon the affairs of the enterprise.[32] This expansive application effectively demanded no more than two distinct allegations of racketeering through the enterprise given that *any* offense committed by the entity will necessarily relate to it and impact its affairs. Despite its stark shortcomings, this view was shared by a majority of the federal courts for some time,[33] largely to further the eradication of organized crime.[34]

In an attempt to give the pattern requirement more substance, other courts demanded that at least two predicate acts relate to a single scheme or criminal episode.[35] Thus, an organized band of hoodlums who purchased narcotics one day and burglarized an apartment the next, without more, would not fall within this somewhat more restrictive definition. However, if this same enterprise used the proceeds of the burglary to finance their drug dealings, the pattern requirement would be met. While this narrower construction is somewhat more satisfying, the concept of relatedness remains inherently expansive. It is rare that two predicate acts are dissimilar in every respect save for the necessary fact that they were committed by the same enterprise. Recognizing this infirmity, the district court in *United States v. Stofsky* borrowed the special offender sentencing definition of pattern from another portion of the Organized Crime Control Act of 1970, of which RICO is a part, to add concreteness to the requirement of relatedness.[36] That transplanted provision states: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes,

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29. 18 U.S.C. § 1962 (a)-(d) (1988).

30. *Id.* at § 1961(5).

31. Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1276 (7th Cir. 1989); AMERICAN LAW INSTITUTE - AMERICAN BAR ASSOCIATION, COURSE OF STUDY MATERIALS: CIVIL RICO LITIGATION 128, 130 (1985) [hereinafter ALI-ABA]. Examples of civil applications during this period include Exeter Towers Assoc. v. Bowditch, 604 F. Supp. 1547 (D. Mass. 1985) and Teleprompter of Erie, Inc. v. City of Erie, 537 F. Supp. 6 (W.D. Pa. 1981). *See generally* PRACTICING LAW INSTITUTE, CIVIL RICO 1988 109-11 (1988) [hereinafter PLI].

32. United States v. Weisman, 624 F.2d 1118, 1122 (2d Cir. 1979), *cert. denied*, 449 U.S. 871 (1980); United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978); United States v. Parness, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Legislative support for this broad view may be found in 116 CONG. REC. 35, 295 (1970) (remarks of Representative Poff).

33. O'Neill, *Elements of a RICO Action*, in RICO: THE ULTIMATE WEAPON IN BUSINESS AND COMMERCIAL LITIGATION C-2 (T.G. Reed ed. 1983).

34. *See, e.g., Elliott*, 571 F.2d at 899 & n.23.

35. United States v. Morelli, 643 F.2d 402, 411-12 (6th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); United States v. Karas, 624 F.2d 500, 504 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981); United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978).

36. 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[37]

Also during this early period, at least one court toyed with the concept of temporal relations between the two predicate acts. In *United States v. Moeller*, then District Court Judge John O. Newman noted that a more common sense interpretation of a pattern did not include "two acts occurring at the same place on the same day in the course of a single criminal episode."[38] These insightful comments were reduced to mere dicta, unfortunately, as the court was bound by precedent to construe the pattern requirement broadly.[39] Judge Newman's reasoning was not widely followed in subsequent cases that did squarely confront this question.[40]

III. THE PATTERN REQUIREMENT AFTER *SEDIMA*

In mid-1985, the Supreme Court concluded its first foray into RICO's civil provisions. As one federal judge succinctly stated afterwards, the Supreme Court's opinion in *Sedima*[41] created a "whole new ballgame."[42] Writing for a five-member majority, Justice White eliminated two harsh restrictions read into RICO by the Second Circuit Court of Appeals. In no uncertain terms, the Court rejected both the view that treble damages were available only against those who had already been criminally convicted of the predicate acts[43] and the prerequisite that a civil plaintiff demonstrate an injury caused by an activity RICO was designed to deter (the RICO injury).[44] While recognizing that these judicially created restrictions were established to curb the use of civil RICO against legitimate businesses, the Court, surprisingly, blamed these extraordinary applications upon "the failure of Congress and the courts to develop a meaningful concept of 'pattern.' "[45]

Having thus rebuked the lower courts, the majority offered the narrowest definition of the term yet conceived. In a now famous footnote,[46] Justice White

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37. 18 U.S.C. § 3575(e), repealed and replaced by Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 212(a)(2), 98 Stat. 1837 (1987).

38. 402 F. Supp. 49, 57 (D. Conn. 1975).

39. *Id.* at 58 (citing *Parness*, 503 F.2d at 438). *See* ALI-ABA, *supra* note 31, at 129.

40. O'Neill, *supra* note 33, at C-3.

41. 473 U.S. 479.

42. Northern Trust Bank/O'Hare N.A. v. Inryco, Inc., 615 F. Supp. 828, 833 (N.D. Ill. 1985).

43. *Sedima*, 473 U.S. at 488-93.

44. *Id.* at 493-500.

45. *Id.* at 499-500. The Court also noted that this phenomena was due, in part, to "the breadth of the predicate offenses." *Id.* at 500. *See also* Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 38 (3d Cir. 1987) ("The Sedima dictum has been widely viewed as a signal to the federal courts to fashion a limiting construction of RICO around the pattern requirement . . .").

46. *Sedima*, 473 U.S. at 496 n.14, states:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effec-

reasoned that the statutory definition of a pattern merely set forth a minimum requirement: two acts of racketeering activity.[47] What else was necessary was left for the national judiciary to resolve.[48]

The Court then turned to the scant legislative history available. Citing a passage from a Senate Report[49] and quips from a pair of congressional sponsors,[50] two axioms were delineated: (1) A pattern does not include sporadic activity; and (2) nor does it encompass isolated offenses.[51] As employed in the footnote, sporadic is the temporal term while isolated describes the identity between the predicate acts. Working backwards, the Court adopted the Senate Report reasoning that the converse, continuity plus relationship, combined to produce a pattern.[52] Since resolution of *Sedima* did not turn upon an interpretation of the pattern of racketeering activity requirement, footnote fourteen was clearly dicta.[53] Considering its source and statutory underpinnings, however, this passage was nevertheless entitled to substantial deference by the lower courts.[54]

Unquestionably, this esoteric analysis exudes confusion. The majority therefore proffered another interpretative aid. Without citation to the twelve-year-old *Stofsky*[55] opinion, the Court pointed to the pattern definition for special offender sentencing[56] contained in the same bill.[57] Unfortunately, this provision applies only to the relationship concept of the RICO pattern and does not assist with the more perplexing continuity problem. Even then, it does little

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tive. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. REP. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . ." 116 CONG. REC. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. *Cf.* Iannelli v. United States, 420 U.S. 770, 789 (1975).

This passage is one of the "most often quoted footnotes in Supreme Court history." BATISTA, *supra* note 23, at 71.

47. *Id. See* D. ROBERTS, RICO: LAW, PRACTICE, AND PROCEDURE 14-15 (1986).

48. *See* Note, *Clarifying a 'Pattern' of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement*, 86 MICH. L. REV. 1745, 1760-62 (1988) (arguing that the inherent ambiguity of § 1961(5) dispelled any hopes that a plain meaning would be discerned and required courts to look outside this language for guidance).

49. S. REP. No. 617, 91st Cong., 2d Sess. 158 (1969).

50. 116 CONG. REC. 18, 940 (1970) (statement of Senator McClellan); 116 CONG. REC. 35, 193 (1970) (statement of Representative Poff).

51. *Sedima*, 473 U.S. at 496 n.14.

52. *Id.*

53. *See* United States v. Ianniello, 808 F.2d 184, 190 (2d Cir. 1986), *cert. denied*, 483 U.S. 1006 (1987).

54. *See* United States v. Indelicato, 865 F.2d 1370, 1381 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 56 (1989). One federal district court judge boldly declared that this "unmistakable signal from the Supreme Court" permitted longstanding appellate court precedent on point to be discarded. *Northern Trust*, 615 F. Supp. at 833. *See generally* BATISTA, *supra* note 23, at 73-74 n.29.

55. 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). *See supra* notes 36-37 and accompanying text.

56. *Supra* note 37 and accompanying text.

57. *Sedima*, 473 U.S. at 496 n.14.

more than set forth several factors a lower court might consider in resolving this particular aspect of a RICO pattern.

Despite the new ambiguities created, the Supreme Court's unexpected discourse into the pattern provision guaranteed that this element would become "*the* battleground on which motions to dismiss civil RICO claims [would] now be fought."[58] Discussions of the once-neglected pattern requirement began to appear in an extraordinary number of opinions after *Sedima*.[59] Not surprisingly, numerous conflicts quickly emerged among the lower courts.[60] These cases can be categorized in three general groups: restrictive, expansive, and middle-of-the-road.[61]

A. *The Restrictive Approach: Pattern Requires At Least Two Distinct Criminal Schemes*

The most restrictive interpretation of the pattern requirement was announced by the Eighth Circuit Court of Appeals in *Superior Oil Co. v. Fulmer*.[62] Rather than confining itself to the phraseology contained in the statute, the court injected the criminal term "scheme."[63] This concept comprised the total of predicate acts committed in furtherance of a criminal objective involving the same participants and victims.[64] No matter how many acts of racketeering were involved, a RICO complaint was insufficient if it merely alleged that a single scheme had taken place.[65] Two judges of the Eighth Circuit openly criticized this view, finding it to be inconsistent with the specific wording of the statute.[66]

All of the other circuits expressly rejected this restrictive approach to the pattern requirement.[67] Reference to criminal schemes accomplished little more than the substitute of "one set of definitional problems for another."[68] Courts that preferred to analyze the pattern requirement on a multifactored case-by-case basis refused to adopt such hard-line rules.[69] Other jurists simply reasoned

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58. ALI-ABA, *supra* note 31, at 127. *See also*, BATISTA, *supra* note 23, at 66 (*Sedima* "was the watershed event in the history of civil RICO."); *Sedima*, 473 U.S. at 501 (Marshall, J., dissenting) ("The Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation . . . ."); Pezzulli & Kinser, *Pleading a RICO Case*, in CIVIL RICO AFTER SEDIMA: A PRACTITIONER'S GUIDE TO RACKETEERING INFLUENCED CORRUPT ORGANIZATIONS LITIGATION 10 (1986) ("[n]ew focus in RICO cases will be in the area of 'pattern of racketeering activity' ").

59. *See* Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1276 (7th Cir. 1989).

60. *See* Furman v. Cirrito, 828 F.2d 898, 908-10 (2d Cir. 1987) (Pratt, J., dissenting); Morris v. Gilbert, 649 F. Supp. 1491, 1502 (E.D.N.Y. 1986).

61. *Accord* PLI, *supra* note 31, at 120-45.

62. 785 F.2d 252 (8th Cir. 1986).

63. *Id.* at 257.

64. *See* 4 RICO Law Reporter 666 (May 1987).

65. *Fulmer*, 785 F.2d at 257.

66. H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648, 650-51 (8th Cir. 1987) (McMillian, J., concurring), *rev'd*, 109 S. Ct. 2893 (1989); *id.* at 651 (Gibson, J., concurring).

67. *H.J. Inc.*, 109 S. Ct. at 2898 & n.2.

68. Roeder v. Alpha Industries, Inc., 814 F.2d 22, 31 (1st Cir. 1987). *See also* Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987); Sun Sav. & Loan Assoc. v. Dierdorff, 825 F.2d 187, 193 (9th Cir. 1987).

69. *Roeder*, 814 F.2d at 31; United States v. Indelicato, 865 F.2d 1370, 1383 (2d Cir. 1989); International Data Bank, Ltd., v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987).

that Congress did not intend to exclude from RICO criminal acts of racketeering that happened to fall within a single scheme.[70] Nevertheless, the multiple schemes requirement persisted in the Eighth Circuit.[71]

Despite its unpopularity among the federal appellate courts, variants upon this approach have appeared in several district court opinions. In *Northwest Trust Bank/O'Hare v. Inryco, Inc.* the court announced that a RICO pattern "presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity."[72] This dubious distinction is almost purely semantical and does little to solidify the pattern requirement.[73] Nevertheless, a subsequent opinion took *Inryco* one step further and demanded separate criminal episodes sufficiently unconnected in time and substance.[74] By creating a complicated analysis involving related predicate acts and unconnected episodes, the court threatened to confine RICO to a small band of eccentric factual settings.[75] Like the multiple schemes requirement, neither the repeated criminal activity nor the unconnected episodes rules enjoyed much support in subsequent case law.

B. *The Expansive Approach: A Pattern Only Requires Two Distinct Predicate Acts*

At the other extreme, the Fifth, Sixth, and Eleventh Circuits endorsed an extremely expansive interpretation of the RICO pattern. In *R.A.G.S. Couture, Inc. v. Hyatt*,[76] the unanimous panel held that the mailing of two allegedly fraudulent letters within five months from different defendants was a sufficient pattern so as to withstand summary judgment.[77] In this court's opinion, *Sedima* implied only that the predicate acts may not be isolated.[78] There can be little doubt that the court was entirely correct when it conceded that this interpretation "stretches the statutory language to its limit."[79] Dissatisfied with this reasoning, several judges on the Fifth Circuit called for an *en banc* reconsideration of *R.A.G.S. Couture*.[80]

In similar fashion, the Sixth and Eleventh Circuits joined forces to fashion an equally broad pattern definition. The Eleventh Circuit began in *United*

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70. *Indelicato*, 865 F.2d at 1383; *Barticheck*, 832 F.2d at 39; *International Data Bank*, 812 F.2d at 155.

71. *See* Phoenix Fed. Sav. & Loan Assoc. v. Shearson Loeb Rhoades, Inc., 856 F.2d 1125, 1128 (8th Cir. 1988); United States v. Kragness, 830 F.2d 842, 858 (8th Cir. 1987); *H.J. Inc.*, 829 F.2d at 650; Ornest v. Delaware North Companies, Inc., 818 F.2d 651, 656 (8th Cir. 1987); Madden v. Gluck, 815 F.2d 1163, 1164 (8th Cir. 1987); Deviries v. Prudential Bache Sec., Inc., 805 F.2d 326, 329 (8th Cir. 1986); Holmberg v. Morrisette, 800 F.2d 205, 210 (8th Cir. 1986); United States v. Ellison, 793 F.2d 942, 950 (8th Cir. 1986).

72. 615 F. Supp. 828, 831 (N.D. Ill. 1985) (emphasis in original). *See generally* BATISTA, *supra* note 23, at 72-75.

73. *See* Sun Sav. & Loan Assoc. v. Dierdorff, 825 F.2d 187, 193 (9th Cir. 1987).

74. Medallion TV Enters., Inc. v. SelecTV, Inc., 627 F. Supp. 1290, 1297 (C.D. Cal. 1986).

75. *See Sun Savings*, 825 F.2d at 193-94.

76. 774 F.2d 1350 (5th Cir. 1985).

77. *Id.* at 1355.

78. *Id.*

79. *Id.* at 1351.

80. Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987); Crocker v. Fed. Deposit Ins. Corp., 826 F.2d 347, 348 n.2 (5th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); Delta Truck & Tractor, Inc. v. J.J. Case Co., 855 F.2d 241, 243 & n.3 (5th Cir. 1988).

States v. Watchmaker[81] by rejecting the multiple schemes requirement.[82] In that case, the defendant, a member of a notorious motorcycle gang, was ultimately charged with shooting three police officers.[83] Relying on the Sixth Circuit's analysis in *United States v. Licavoli*,[84] the panel held that a pattern existed when two separate violations of state or federal law were established.[85] This rationalization produced a surprising result: the conspiracy to commit and actual commission of a predicate act could by themselves constitute a pattern of racketeering activity. Thus in *Licavoli*, the conspiracy to murder and the murder itself were enough to indict organized crime members for a violation of RICO since both acts comprised distinct violations of state law.[86] A pattern of racketeering activity was found to exist even though the defendants had engaged in a single criminal episode involving one victim over a very brief period of time. In order to preclude this result, one model state RICO statute expressly declares that a pattern is *not* formed by acts comprising a single event.[87]

After *Sedima*, the Eleventh Circuit reaffirmed *Watchmaker* in *Bank of America v. Touche Ross & Co.*[88] While its precise holding is unclear, the court seemingly required only two related predicate acts comprising separate statutory violations to establish a RICO pattern.[89] Although the panel made a passing reference to *Sedima*'s continuity element, there was no discussion as to how it was satisfied by the facts presented.[90] In like fashion, the Sixth Circuit upheld *Licavoli* and endorsed *Watchmaker* in *United States v. Jennings*.[91] The unanimous panel repeatedly stated that a RICO pattern required only two acts of racketeering activity.[92] No reference was made to *Sedima* or the concepts of continuity and relatedness. Both the Sixth and Eleventh Circuits thus joined the Fifth Circuit in declaring that two related predicate acts would form a pattern of racketeering activity if each comprised a separate violation of state or federal law.[93]

C. *The Middle-of-the-Road Approach: A Pattern Must Be Discerned From a Multiplicity of Factors*

The approach a majority of the federal circuits adopted after *Sedima* employed a case-by-case analysis devoid of rigid rules. These courts generally ac-

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81. 761 F.2d 1459 (11th Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986).

82. *Id.* at 1475.

83. *Id.* at 1477.

84. 725 F.2d 1040 (6th Cir. 1984), *cert. denied*, 467 U.S. 1252.

85. *Watchmaker*, 761 F.2d at 1475 (also citing United States v. Phillips, 664 F.2d 971 (5th Cir. Unit B 1981), *cert. denied, sub nom.* Meinster v. United States, 457 U.S. 1136 (1982)).

86. *Licavoli*, 725 F.2d at 1047.

87. Criminally Influenced and Corrupt Organizations Act § 5(j)(1)(iv) (1985), *reprinted in*, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION: A REPORT OF THE RICO CASES COMMITTEE 29 (1985).

88. 782 F.2d 966, 971 (11th Cir. 1986).

89. *Id.*

90. *Id.* at 970-71.

91. 842 F.2d 159, 163 (6th Cir. 1988).

92. *Id.* at 162-64.

93. *See* Chepiga & Khuzami, *The Evolving Concept of "Pattern" Under the Racketeer Influenced and Corrupt Organizations Act* in PRACTICING LAW INSTITUTE, CIVIL RICO 1988 122-23 (1988).

cepted the Supreme Court's suggestion that a RICO pattern requires both relatedness and continuity.[94] To determine whether these elements exist, a variety of factors were consulted.[95]

Few courts struggled with the concept of relatedness. The general question asked was whether the predicate acts "may be viewed as having a common purpose" and were not sporadic.[96] Predicate acts that furthered a single criminal scheme were found to be *per se* related.[97] In other cases, courts found reference to the special sentencing pattern definition[98] to be helpful as suggested in *Sedima*.[99]

Analysis of the continuity element proved far more troubling. This amorphous concept was regarded as requiring that the predicate acts "occur over time and perhaps threaten to recur."[100] The first opinion after *Sedima* to forcefully advocate a multifactor approach to continuity was *Morgan v. Bank of Waukegan*.[101] Steering a self-described middle course between two extremes, continuity was described as requiring that "the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions."[102] Rather than end its analysis with this vague definition, that court offered five relevant factors for determining whether a pattern of racketeering activity exists: (1) the number and variety of predicate acts; (2) the length of time over which the predicate acts were committed; (3) the number of victims; (4) the presence of separate schemes; and (5) the infliction of distinct injuries.[103] Characterizing this approach as "a standard, not a rule," the *Morgan* court expressly acknowledged that no one factor is necessarily determinative.[104] Applying this analysis to the facts before it, a single scheme over four

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94. *Sedima*, 473 U.S. at 496 n.14. Opinions adopting the Court's relatedness and continuity analysis after *Sedima* are obviously too numerous to list here but examples include Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928-29 (10th Cir. 1987), and Morgan v. Bank of Waukegan, 804 F.2d 970, 975-77 (7th Cir. 1986). It was noted in Sun Sav. & Loan Assoc. v. Dierdorff, 825 F.2d 187, 192 (9th Cir. 1987), however, that "the Supreme Court does not enshrine 'continuity plus relationship' as a determinative two-pronged test"; *see also* United States v. Indelicato, 865 F.2d 1370, 1383 (2d Cir. 1989). The *Sun Savings* court argued that reference to those concepts was made only to aid in weeding out isolated and sporadic acts from the scope of RICO. 825 F.2d at 192. In Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 38-39 (3d Cir. 1987), the court implied that characterizations such as continuous and related are too abstract, requiring a multifactor approach to the pattern requirement. Most courts, however, view the multifactor analysis as a means of determining whether relatedness and continuity, and hence a RICO pattern, do exist. *See, e.g.*, Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc., 879 F.2d 10, 15-19 (2d Cir. 1989). Some opinions employing the multifactor view have preferred to use the terms sporadic and isolated rather than related and continuous. *See Sun Savings*, 825 F.2d at 194. This distinction apparently arises merely as a difference in choice of phraseology, however, and has no meaningful impact upon multifactor pattern analysis.

95. *See generally* Huestis, *RICO: The Meaning of 'Pattern' Since Sedima*, 54 BROOKLYN L. REV. 621 (1988) (advocating fact-based approach utilizing a variety of different factors).

96. *Procter & Gamble*, 879 F.2d at 17.

97. *See Sun Sav.*, 825 F.2d at 192.

98. *See supra* note 42.

99. *See Procter & Gamble*, 879 F.2d at 16-17; United States v. Indelicato, 865 F.2d 1370, 1374 (2d Cir. 1989) (citing United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976)).

100. *Procter & Gamble*, 879 F.2d at 17.

101. 804 F.2d 970 (7th Cir. 1986). *See* BATISTA, *supra* note 23, at 87-89.

102. 804 F.2d at 975.

103. *Id. See also* Jones v. Lampe, 845 F.2d 755, 757 (7th Cir. 1988).

104. 804 F.2d at 976. *See also* Roeder v. Alpha Industries, Inc., 814 F.2d 22, 31 (1st Cir. 1987).

years involving mail fraud in connection with a loan transaction and two separate foreclosures was found to present a RICO pattern.[105]

While *Morgan*'s separate transactions characterization was never widely cited, its multifactor approach enjoyed substantial support among the other federal circuits.[106] Neither the presence of a single scheme[107] nor a single victim[108] precluded some courts from finding that a RICO pattern existed. Similarly, closed schemes over a period of a few months were also found, under special circumstances, to present a pattern.[109] More often, however, a short-lived scheme with a single discrete objective presenting no threat of future criminal activity was usually found to be an isolated event.[110] An ongoing scheme, on the other hand, posing a substantial risk of continued racketeering was sufficient to satisfy the pattern requirement even though it lacked multiple victims and a sustained period of unlawful conduct.[111] Conversely, alleged criminal conduct spanning several years did *not* present a RICO pattern where counterveiling *non-durational* factors so indicated.[112]

The presence of multiple victims was found by some courts to be a strong indication that a pattern of racketeering activity exists.[113] This is especially true where each victim was injured by separate predicate acts.[114] Racketeering activity which displayed a variety of crimes was clearly suggestive of a pattern if such acts were still otherwise related.[115] The raw number of predicate acts presented was also highly relevant to this inquiry. However, several courts questioned whether this easily identified factor was being afforded too much weight

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105. 804 F.2d at 976.

106. *See* Chepiga & Khuzami, *supra* note 93, at 123-25.

107. *See, e.g.*, Deppe v. Tripp, 863 F.2d 1356, 1367 (7th Cir. 1988); Liquid Air v. Rogers, 834 F.2d 1297, 1303-05 (7th Cir. 1987); Appley v. West, 832 F.2d 1021, 1027-28 (7th cir. 1987); Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1279 (7th Cir. 1989); Bank of America v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986); United Energy Owners, Inc. v. United Energy Management Sys., Inc., 837 F.2d 356, 361 (9th Cir. 1988); California Arch. Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1469 (9th Cir. 1987).

108. *See, e.g., Appley*, 832 F.2d at 1027-28; *Liquid Air*, 834 F.2d at 1303-05.

109. *See, e.g., Ashland Oil*, 875 F.2d at 1279; *California Arch.*, 818 F.2d at 1469. *See also* Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987) (rejecting "view that racketeering acts committed pursuant to a single scheme can constitute a RICO pattern only if the scheme is potentially ongoing or open-ended"). *Id.*

110. *See, e.g.*, Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928-29 (10th Cir. 1987); Lipin Enterprises, Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154-55 (4th Cir. 1987); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 31 (4th Cir. 1987); Beauford v. Helmsley, 843 F.2d 103, 110 (2d Cir. 1988); Medallion Television Enter. v. SelecTV, Inc., 833 F.2d 1360, 1363-64 (9th Cir. 1987); Jarvis v. Regan, 833 F.2d 149, 153 (9th Cir. 1987); Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987); Simpson Elec. Corp. v. Leucadia, Inc., 72 N.Y.2d 450, 463, 534 N.Y.S.2d 152, 160 (1988).

111. Bumgarner v. Blue Cross & Blue Shield of Kansas, 716 F. Supp. 493, 500 (D. Kan. 1988); Smith v. MCI Telecommunications Corp., 678 F. Supp. 823, 827 (D. Kan. 1987); Wichita Fed. Sav. & Loan Assoc. v. Landmark Group, Inc., 674 F. Supp. 321, 331 (D. Kan. 1987); O'Connor v. Midwest Pipe Fabricators, Inc., 660 F. Supp. 696, 698-99 (D. Kan. 1987); Morgan v. Bank of Waukegan, 804 F.2d 970, 976-77 (7th Cir. 1986). One court suggested that for a RICO pattern to exist in a completed scheme, a threat of continuity need appear only at some point during the whole course of racketeering activity. Sun Sav. & Loan Assoc. v. Dierdorff, 825 F.2d 187, 194 n.5 (9th Cir. 1987).

112. *See, e.g.*, HMK Corp. v. Walsey, 828 F.2d 1071, 1074-77 (4th Cir. 1987); Framingham Union Hospital, Inc. v. Travelers Ins. Co., 721 F. Supp. 1478, 1484 (D. Mass. 1989).

113. *See, e.g., Ashland Oil*, 875 F.2d at 1279; *California Arch.*, 818 F.2d at 1469; United Energy Owners Committee, Inc. v. United Energy Management Sys., Inc., 837 F.2d 356, 361 (9th Cir. 1988).

114. *See, e.g., Ashland Oil*, 875 F.2d at 1279.

115. *See, e.g., id.*

especially when mail and wire fraud were involved.[116] Nevertheless, the view was often expressed that repeated predicate acts upon one victim in one scheme could establish a pattern of racketeering activity where numerous and distinct economic injuries were suffered.[117]

Unquestionably, *Morgan* did not provide an exhaustive list of factors relevant to the establishment of a continuous RICO pattern. Courts also considered, in other contexts: (1) the number of participants; (2) the purpose of the activity; and (3) whether the operation was ongoing or finite.[118] Analysis of these factors necessarily required an examination beyond the bare criminal acts of racketeering presented and into both the entire enterprise and course of events which transpired.[119]

While generally applying the multifactor analysis to RICO patterns, the Second Circuit Court of Appeals adopted a unique approach to the question of continuity.[120] Prior to *Sedima*, the court had held that two otherwise unrelated predicate acts by a single enterprise can suffice to satisfy the pattern requirement of RICO.[121] Noting that *Sedima*'s footnote fourteen was simply dicta, this early decision was reaffirmed in *United States v. Ianniello*.[122] While refusing to narrow its pattern definition by adding the requirement of continuity, the court nevertheless announced that this concept was properly viewed as an element of a RICO enterprise.[123] The panel ultimately held that relatedness and continuity necessarily existed anytime "a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated."[124] *Beck v. Manufacturers Hanover Trust Co.*[125] reiterated that a RICO pattern requires only two related predicate acts and not multiple episodes.[126] The court added, however, that a RICO enterprise must be a continuing, ongoing organization and not a mere short-term operation with one straightforward goal.[127] Whether one examined continuity from the aspect of the pattern or the enterprise was conceded by the *Beck* panel to be "really a matter of form, not substance."[128]

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116. *See Ashland Oil*, 875 F.2d at 1278-79; *HMK Corp.*, 828 F.2d at 1074-77; Lipin Enterprises, Inc. v. Lee, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring); Elliot v. Chicago Motor Club Ins., 809 F.2d 347, 350 (7th Cir. 1986); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154-55 (4th Cir. 1987); Roeder v. Alpha Industries, Inc., 814 F.2d 22, 31 (1st Cir. 1987).

117. *See, e.g.*, Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1304-05 (7th Cir. 1987); Midwest Grinding Co. v. Spitz, 716 F. Supp. 1087 (N.D. Ill. 1989).

118. *See* Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987); Framingham Union Hosp., Inc. v. Travelers Ins. Co., 721 F. Supp. 1478, 1484 (D. Mass. 1989).

119. *Barticheck*, 832 F.2d at 39; United States v. Indelicato, 865 F.2d 1370, 1385-86 (2d Cir. 1989) (Oakes, C.J., concurring).

120. *See* Chepiga & Khuzami, *supra* note 93, at 130-44; PLI, *supra* note 31, at 130-45.

121. United States v. Weisman, 624 F.2d 1118, 1121-23 (2d Cir. 1980), *cert. denied*, 449 U.S. 871 (1980).

122. 808 F.2d 184, 190 (2d Cir. 1986).

123. *Id.* at 191.

124. *Id.* at 192.

125. 820 F.2d 46 (2d Cir. 1987).

126. *Id.* at 51.

127. *Id.* Compare cases cited *supra* note 110.

128. *Id. See generally* Simpson Elec. Corp. v. Leucadia, Inc., 72 N.Y.2d 450, 462-64, 534 N.Y.S.2d 152, 159-60 (1988) (state court reaching same result when applying federal RICO under both approaches).

Finally in *United States v. Indelicato*,[129] the Second Circuit abandoned its peculiar approach to continuity.[130] Although continuity was no longer a requirement of a RICO enterprise, but of the pattern, the nature of the enterprise could nevertheless "serve to show the threat of continuing activity."[131] For example, an enterprise whose everyday business involves the commission of predicate acts clearly exhibits a threat of continued racketeering activity.[132] Despite this overlap in the proof required for a pattern and enterprise, the court emphasized that the the two terms still involved separate and distinct elements of a RICO claim.[133]

When taken together, these various decisions espousing a multifactor approach fail to produce any concrete rules or principles. Lacking mechanical tests to determine the existence of a RICO pattern, these courts relied instead upon a case-by-case analysis which viewed the issue as "a matter of criminal dimension and degree."[134] While it is difficult to assess whether this approach resulted in more civil awards and criminal convictions, it is likely that the abandonment of the bright-line rules made early dismissal on the pleadings far more difficult to obtain.[135]

IV. THE ARRIVAL OF *H.J. INC. V. NORTHWESTERN BELL TEL. CO.*

Recognizing the wide split that *Sedima* had created, the Supreme Court opted to confront the pattern requirement head-on in *H.J. Inc. v. Northwestern Bell Tel. Co.*[136] Petitioners, the customers of respondent Northwestern Bell Telephone Company, alleged in this class action that the phone company had paid bribes to members of the Minnesota Public Utilities Commission over a six year period.[137] Bound to the dictates of *Fulmer*,[138] the district court dismissed the complaint as only a single scheme had been alleged.[139] The Court of Appeals for the Eighth Circuit affirmed,[140] although two members of the panel suggested that the court reconsider its test for a RICO pattern.[141]

The Supreme Court unanimously rejected the Fifth, Sixth, and Eleventh Circuits' expansive interpretation by holding that a pattern of racketeering activity requires more than just multiple predicate acts.[142] Similarly, the entire Court agreed that no support existed within the statute for the Eighth Circuit's

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129. 865 F.2d 1370 (2d Cir. 1989).

130. *Id.* at 1381-85; *see* Dooner v. NMI Ltd., 725 F. Supp. 153, 161 (S.D.N.Y. 1989).

131. *Indelicato*, 865 F.2d at 1383.

132. *Id.*

133. *Id.* at 1384 (citing United States v. Turkette, 452 U.S. 576, 583 (1981)).

134. International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987). *See also* Barticheck v. Fidelity Union/First Nat'l State, 832 F.2d 36 (3d Cir. 1987).

135. BATISTA, *supra* note 23, at 89.

136. 109 S. Ct. 2893 (1989).

137. *Id.* at 2897.

138. 785 F.2d 252 (8th Cir. 1986).

139. 648 F. Supp. 419, 425 (D. Minn. 1986).

140. 829 F.2d 648, 650 (8th Cir. 1987).

141. *Supra* note 66 and accompanying text.

142. 109 S. Ct. at 2899-900. Justice Scalia's concurrence also expressed its support of this position, *id.* at 2908, allowing the Court to speak unanimously on this particular question.

requirement of multiple schemes in a RICO pattern.[143] Having eliminated the prevailing extremist views, the nine justices were unable to see eye to eye on exactly what was required beyond multiple predicate acts for a RICO pattern to exist.[144]

Following *Sedima*'s footnote fourteen closely, Justice Brennan, writing for the five member majority, attempted to provide concrete meaning to the concepts of relatedness and continuity.[145] Based upon its reading of the legislative history, the Court reasoned that Congress had a "natural and commonsense approach to RICO's pattern element in mind."[146] The justices suggested "that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set" by section 1961(5).[147] As in *Sedima*,[148] relatedness was defined by reference to the Dangerous Special Offender Sentencing Act,[149] now partially repealed.[150] In his separate concurrence, Justice Scalia doubted that Congress intended this result since this sentencing provision was contained within the same act of which RICO was a part but "was explicitly *not* rendered applicable to RICO."[151] He argued further that this transplanted pattern definition was utterly uninformative and provided absolutely no meaningful limits.[152]

Turning next to the continuity element, the majority maintained that "[w]hat a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter*."[153] Citing *Barticheck v. Fidelity Union Bank/First National State*,[154] Justice Brennan described continuity as "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."[155] The Court further stated that:

> A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.[156]

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143. *Id.* at 2899-900. Again, the concurring opinion shared this view, *id.* at 2909 (Scalia, J., concurring). For the reactions of two of these lower courts see Smith v. Cooper/T. Smith Corp., 886 F.2d 755 (5th Cir. 1989); United States v. Hobson, 893 F.2d 1267 (11th Cir. 1990).

144. 109 S. Ct. at 2908 (Scalia, J., concurring).

145. *Id.* at 2898-902.

146. *Id.* at 2899.

147. *Id.* at 2900.

148. 473 U.S. at 496 n.14.

149. *Supra* note 37 and accompanying text.

150. 109 S. Ct. at 2900-01.

151. *Id.* at 2907 (Scalia, J., concurring) (citing Russello v. United States, 464 U.S. 16, 23 (1983)) (emphasis in original).

152. 109 S. Ct. at 2907 (Scalia, J., concurring).

153. *Id.* at 2901.

154. 832 F.2d 36 (3rd Cir. 1987).

155. 109 S. Ct. at 2902.

156. *Id.* (emphasis in original).

Rather than list factors for lower courts to consider in their pattern analysis, the Court offered three possible examples of how this element might be demonstrated: (1) related predicate acts involving "a distinct threat of long-term racketeering activity, either implicit or explicit"; (2) related predicate acts comprising "part of an ongoing entity's regular way of doing business"; or (3) related predicate acts which are a regular way of conducting the defendant's "ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise.' "[157]

The Court also rejected the contentions of various *amici* urging that the RICO pattern be restricted to those activities traditionally viewed as characteristic of organized crime.[158] The majority reasoned that like the multiple scheme standard, this proposed condition was unsupported by the language of the statute and its legislative history.[159]

Applying this analysis to the facts presented, Justice Brennan had little trouble determining that a RICO pattern had been sufficiently plead.[160] The complaint alleged an ongoing six year scheme by Northwestern Bell to secure favorable rates through numerous bribes in several different forms.[161] These predicate acts of bribery shared a common purpose and thus satisfied the relatedness element.[162] Furthermore, the considerable number of bribes were alleged to have occurred frequently over a substantial period of time satisfying the continuity requirement.[163] Alternatively, the Court acknowledged that "a threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise."[164]

Justice Scalia and the three other concurring justices found the continuity plus relationship analysis to be about as helpful as "life is a fountain."[165] They objected particularly to the continuity reasoning for allowing racketeers a safe harbor within which to conduct their illegal activities during a closed period of a few months regardless of "how many different crimes and different schemes

157. *Id.*

158. *Id.* at 2902-05. *Amicus Curiae* briefs were submitted on behalf of the Washington Legal Foundation, American Federation of Labor, Congress of Industrial Organizations, National Association of Manufacturers, and the American Institute of Certified Public Accountants. *Id.* at 2903 n.5.

159. *Id.* at 2903-05. Initially, the Court explained that RICO was not intended by its sponsors to be limited simply to organized crime groups but also extended to individuals acting alone. *Id.* at 2903. While the legislature has repeatedly employed "organized crime" restrictions in other statutes, it conspicuously failed to do so in RICO. *Id.* Suggestions in the Act's preamble and remarks of various congressmen that RICO was enacted to combat organized crime did not persuade the Court otherwise. *Id.* Indeed, the majority cited several instances where sponsors of the original bill had expressly rejected calls to limit RICO to the traditional "mobster." *Id.* at 2904-05. Citing *Sedima*, 473 U.S. at 499, the Court reaffirmed its view that Congress had intended to reach both legitimate and illegitimate enterprises through RICO. *Id.* at 2905.

160. *Id.* at 2906.

161. *Id.* at 2897-98, 2906.

162. *Id.* at 2906.

163. *Id.*

164. *Id.*

165. *Id.* at 2907 (Scalia, J., concurring).

are involved."[166] On the other hand, the concurrence noted that the Court's majority opinion made it more difficult for a potential offender to determine whether his actions would fall within the amorphous scope of RICO.[167] Conceding that they were unable to provide a more satisfactory definition of a RICO pattern, the four justices found the statute's inherent vagueness to be intolerable.[168] "That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when [a constitutional] challenge is presented."[169] Undoubtedly, *H.J. Inc.* will not stand long as the Court's last statement on federal RICO.[170]

V. THE PATTERN REQUIREMENT AFTER *H.J. INC.*

Predictably, *H.J. Inc.* spawned a host of opinions from the federal judiciary. As of this writing, this decision has been discussed at length by each of the federal Circuit Courts of Appeal and was cited in numerous district court decrees.[171] At the other extreme, state court reference to *H.J. Inc.* has been relatively rare. However, this inattention may disappear rapidly as the Supreme Court recently affirmed that state courts enjoy subject matter jurisdiction over federal RICO lawsuits.[172]

Despite Justice Scalia's dire predictions, *H.J. Inc.* appears, at least in the early going, to have significantly focused judicial analysis of the pattern requirement. Moreover, at least one judge has openly indicated that this opinion has greatly clarified this critical element of RICO.[173] A uniform approach to analyzing patterns of racketeering activity has thus begun to emerge. This systematic calculus may be subdivided into three general elements: two distinct acts of racketeering activity, relatedness, and continuity.

A. *Two Distinct Acts of Racketeering Activity*

As a threshold demand, invocation of federal RICO requires the existence of two distinct acts of racketeering activity.[174] This is the only prerequisite Con-

166. *Id.* at 2908 (Scalia, J., concurring).

167. *Id.*

168. *Id.*

169. *Id.* at 2909 (Scalia, J., concurring).

170. *RICO Decision Unlikely to Be the Final Word*, THE NATIONAL LAW JOURNAL, July 10, 1989, at 5. One circuit court of appeals has recently rejected a constitutional vagueness attack on the pattern requirement as applied to an organized crime family. United States v. Angiulo, 897 F.2d 1169, 1178-80 (1st Cir. 1990).

171. *See infra* notes 172-268 and cases cited therein.

172. Tafflin v. Levitt, 110 S. Ct. 792 (1990). *H.J. Inc.* has been consulted, however, by state courts applying their own state RICO statutes. Dover v. State, 192 Ga. App. 429, 385 S.E.2d 417, 420 (1989); Computer Concepts, Inc. Profit Sharing Plan v. Brandt, 98 Or. App. 618, 631, 780 P.2d 249, 256 (1989).

173. Walk v. Baltimore and Ohio R. R., 890 F.2d 688, 690 (4th Cir. 1989). *But see* Swistock v. Jones, 884 F.2d 755, 757 (3d Cir. 1989) ("the degree of concrete guidance provided by *H.J. Inc.* is open to debate"); Orchard Hills Coop. Apts. Inc. v. Germania Fed. S. & L. Assoc., 720 F. Supp. 127, 130 (C.D. Ill. 1989) (*H.J. Inc.*'s only substantive contribution is the striking of the multiple schemes requirement).

174. *Sedima*, 473 U.S. at 496 n.14; *H.J. Inc.*, 109 S. Ct. at 2899; United States v. Casamento, 887 F.2d 1141, 1163-64 (2d Cir. 1989); Callanan v. United States, 881 F.2d 229, 334-35 (6th Cir. 1989).

gress expressly included in the plain language of the statute.[175] An appropriate starting point for the pattern analysis is thus provided.[176] It is important to note that not every illegal act constitutes racketeering activity as RICO only targets certain crimes specified in the statute.[177]

In most cases, whether two distinct acts of racketeering activity have been established will be a straightforward and easily resolvable question.[178] To be safe, a plaintiff or prosecutor should allege every predicate act known at that time in order to maximize the chances that at least two will survive. Difficulty arises, however, when the only acts specified are so interrelated that they no longer appear separate and distinct. This situation is not uncommon due to the twin requirements of relatedness and continuity. Commentators have expressed concern over the apparent tension between these two aims.[179] Nevertheless, while the requirements of relatedness and continuity do compete, theirs is a healthy competition and not at all troublesome. In both *Sedima*[180] and *H.J. Inc.*,[181] the Supreme Court explained that the predicate acts comprising the pattern of racketeering activity must be related but not to the point where the course of criminal activity was isolated in time. Conversely, while the element of continuity is similarly required, it is not evidenced by sporadic acts even over an extended period of time. By demanding both relatedness and continuity, the Court targeted a specific field of conduct. Although not every series of related predicate acts exhibits continuity and vice versa, only criminal activities that display both elements present the sort of long term, organized criminal behavior RICO seeks to eradicate.

When the alleged predicate offenses are so related that they blur together, however, reference must be made, of course, to the applicable criminal statutes which define the crimes. RICO's definition of racketeering activity employs both state and federal prohibitions against specific forms of conduct.[182] The pre-*H.J. Inc.* courts generally agreed that the phrase "acts of racketeering activity," as used in the pattern definition,[183] connotes two separately chargeable or indictable offenses under the appropriate state *or* federal law.[184] Stress must be placed, however, on the requirement of two separate acts of racketeering activ-

175. 18 U.S.C. § 1961(5) (1988). *See generally* RAKOFF & GOLDSTEIN, *supra* note 24, at § 1.04[2][a] (1989).

176. *See, e.g.*, United States v. Local 359, 889 F.2d 1232, 1234 (2d Cir. 1989), Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166 (3d Cir. 1989); Dah Chong Hong, Ltd. v. Silk Greenhouse, Inc., 719 F. Supp. 1072, 1074 (M.D. Fla. 1989).

177. 18 U.S.C. § 1961(1) (1988). *See* Ferdinand Drexel Inv. Co. v. Alibert, 723 F. Supp. 313, 332 (E.D. Pa. 1989).

178. *See, e.g., Shearin*, 885 F.2d at 1166.

179. RAKOFF & GOLDSTEIN, *supra* note 24, at § 1.04[2][d]; ROBERTS, *supra* note 47, at 20. Various courts have also discussed this issue. United States v. Indelicato, 865 F.2d 1370, 1383 (2d Cir. 1989); Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986).

180. 473 U.S. at 496 n.14.

181. 109 S. Ct. at 2900.

182. 18 U.S.C. § 1961(1) (1988).

183. *Id.* at § 1961(5).

184. *See, e.g.*, Bank of America v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986) (quoting United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985)); United States v. Jennings, 842 F.2d 159, 163 (6th Cir. 1988).

ity to satisfy this preliminary requirement. In *United States v. Walgren*, the Ninth Circuit Court of Appeals was presented with a single act, a telephone call, which constituted both bribery and extortion.[185] The prosecution advanced the theory that since two separate statutes were violated, the defendant was chargeable for two criminal offenses as required for a pattern of racketeering activity.[186] The court rejected this approach by noting that the fact that the phone conversation violated both state and federal law was purely fortuitous.[187] The coincidence that the conduct alleged is prohibited by two statutes is a mere byproduct of federalism and does not evince a pattern of racketeering activity. Congress was more concerned with repeated criminal conduct. Therefore, RICO requires two identifiable acts each chargeable or indictable under a specific state or federal law.[188]

B. *Relatedness*

The relatedness element of a RICO pattern suggested in *Sedima*[189] was left largely unchanged by *H.J. Inc.*[190] Drawing insight from the Dangerous Special Offender Sentencing Act,[191] the Court advanced several distinguishing characteristics that might exist between relevant acts demonstrating an interrelationship.[192] The purpose of this loose requirement is clear: to remove isolated events from RICO's scope which do not evince organized and systematic criminal activity or the threat of such.[193]

While the *H.J. Inc.* majority advised that, for analytical purposes, continuity and relatedness should be stated separately,[194] at least one federal appellate court has lumped the two together. In *Shearin v. E.F. Hutton Group, Inc.*, the Third Circuit took the view that "the similarity of the acts" was just one of many factors to be considered along with "the number of acts, the length of time involved, . . . the number of victims, the number of perpetrators, and the nature of the activities."[195] By and large, these latter factors are relevant only to the continuity element of a pattern. Under this approach, the court seems to suggest that a RICO pattern can be discerned from disimilar acts so long as the other enumerated factors are sufficiently established. Reducing the requirement of relatedness to just one of several non-essential factors opens up RICO to the

185. 885 F.2d 1417, 1425-26 (9th Cir. 1989).

186. *Id.*

187. *Id.* at 1426.

188. *Compare* United States v. Kaplan, 886 F.2d 536, 541-42 (2d Cir. 1989) (two simultaneous bribes to two city officials could constitute two acts of racketeering activity) *with* Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 883 F.2d 48, 50-51 (7th Cir. 1989) (while unauthorized copying of computer program may constitute one predicate offense, subsequent use of the stolen product did not create additional acts).

189. 473 U.S. at 496 n.14.

190. 109 S. Ct. at 2900-01.

191. *Supra* note 37 and accompanying text.

192. 109 S. Ct. at 2901.

193. *Id.* at 2899-901.

194. *Id.* at 2900. The Court adds that each element is a *distinct* requirement of a RICO pattern. *Id.* at 2902.

195. 885 F.2d 1162, 1166 (3d Cir. 1989). Continuity and relationship were also comingled in Triad Assoc., Inc. v. Chicago Housing Auth., 892 F.2d 583, 595 (7th Cir. 1989), which was decided well after *H.J. Inc.* However, that appeal was argued before *H.J. Inc.* was released and does not cite that opinion.

mere habitiual offender who commits isolated, albeit repeated, crimes in an unorganized, unplanned, and random fashion. By demanding both relatedness and continuity, the Supreme Court clearly believed Congress intended to reach a more narrow and sophisticated band of criminals.[196] Likewise, the other federal appellate courts compartmentalize the two elements in their own pattern analysis.[197]

In *Swistock v. Jones*, another panel of the Third Circuit, this time led by Judge Slovitor, distinguished between relatedness and continuity and appeared to require both for a valid RICO pattern.[198] Nevertheless, the court still considered the similarity of the acts as an element of continuity.[199] How such a factor demonstrates ongoing criminal activity or the threat thereof is unclear. Without question, similarity of the acts is just another term for relatedness. Such blurring of the fine line between relatedness and continuity allows both elements to be satisfied — theoretically — by conduct comprised merely of similar acts. Ironically, this is the opposite result from that achieved in *Shearin* which allowed a RICO pattern to be continuous without necessarily exhibiting relatedness. Neither is analytically sound. The more rational approach treats similarity of the acts as evincing only relatedness and not continuity.[200]

While clearly distinct, relatedness between acts may still "be established in a number of ways."[201] Because RICO was drafted with "a desire to avoid creating loopholes for clever defendants and their lawyers,"[202] courts should be receptive to new and novel methods of satisfying this requirement. *H.J. Inc.* acknowledges implicitly that relatedness is not an overly restrictive component of a RICO pattern.[203] Indeed, the "or otherwise" language of the Dangerous Special Offender Sentencing Act[204] clearly suggests that this definition is not all-encompassing.[205]

This conclusion does not imply, however, that relatedness is without meaning. In determining what characteristics properly demonstrate interrelationship among acts attributed to a defendant, RICO's legislative purpose and history must, of course, be the guide.[206] Therefore, relationships which suggest organized and systematic criminal conduct may satisfy the requirement. At the other extreme, relationships which are purely coincidental, fortuitous, or inherent in all criminal acts, mark activity which is properly characterized as random, unorganized, and outside RICO's purview. Employing this analysis, the mere fact

196. *H.J. Inc.*, 109 S. Ct. at 2900; *Sedima*, 473 U.S. at 496 n.14.

197. *See, e.g.*, Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 994-95 (8th Cir. 1989); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1273 (10th Cir. 1989); Jacobson v. Cooper, 882 F.2d 717, 720 (2d Cir. 1989).

198. 884 F.2d 755, 757-59 (3d Cir. 1989).

199. *Id.* at 758.

200. One panel of the Third Circuit appears to have expressly adopted this properly bifurcated approach, Marshall-Silver Const. Co. v. Mendel, 894 F.2d 593, 595 n.1 (3d Cir. 1990).

201. United States v. Local 359, United Seafood Workers Union, 889 F.2d 1232, 1234 (2d Cir. 1989).

202. Haroco v. American Nat'l Bank and Trust Co. of Chicago, 747 F.2d 384, 390 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).

203. 109 S. Ct. at 2901. *See also id.* at 2907 (Scalia, J., concurring).

204. *See supra* note 37 and accompanying text.

205. *See H.J. Inc.*, 109 S. Ct. at 2907 (Scalia J., concurring).

206. *Id.* at 2899. *See supra* notes 2-22 and accompanying text.

that the victims of a crime spree were all women, the acts were all committed to enrich the defendant, or the conspirators were all co-employees,[207] would not, by itself, evince the degree of sophisticated criminal conduct Congress intended to reach.[208]

One universally overlooked aspect of the relationship prong is its scope. Without question, this requirement applies to the two predicate acts of racketeering activity which the Supreme Court has unequivocally demanded be related.[209] A determination of whether a pattern exists, however, requires an examination of all relevant events and circumstances and not simply the mere criminal acts.[210] In remanding the case before it, the Court in *H.J. Inc.* suggested that a pattern "might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conduct or participating in the conduct of the alleged and ongoing RICO enterprise . . . ."[211] It naturally follows that activities which relate to the "purposes, results, participants, victims, or methods of commission, or otherwise,"[212] must be considered even though not constituting predicate offenses as defined in RICO.[213] The relationship requirement should therefore be applied to every act, event, and circumstance purported to evince a RICO pattern. These facts are relevant only if related to each other in a manner which demonstrates organized and systematic criminal conduct. Acts, events, and circumstances which are isolated from this course of activity are irrelevant and serve only to distract the court from the task of discerning a valid RICO pattern.

C. *Continuity*

While *H.J. Inc.*[214] adds little substance to *Sedima's*[215] discussion of relatedness, the opinion expounds somewhat upon the continuity element.[216] The Court adopted "a less inflexible" approach to the term derived "from a common-sense, everyday understanding of RICO's language and Congress' gloss on it."[217] Legitimately continuous criminal activities were subdivided into two categories: closed and open-ended.[218] As reported earlier in this Comment, the

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207. *H.J. Inc.*, 109 S. Ct. at 2907 (Scalia, J., concurring).

208. This analysis makes no attempt to introduce new and perhaps more amorphous concepts to the pattern requirement but simply attempts to clarify the Supreme Court's interpretation of legislative intent and provide a useful approach to applying that intent in practice. *See id.* at 2901 n.3.

209. *Id.* at 2900 (citing 116 CONG. REC. 18,940 (1970) (remarks of Senator McClellan); *Sedima*, 473 U.S. at 496 n.14 (two isolated acts of racketeering activity do not constitute a pattern).

210. *See, e.g.*, United States v. Indelicato, 865 F.2d 1370, 1382-84 (2d Cir. 1989).

211. 109 S. Ct. at 2906.

212. *Id.* at 2901.

213. 18 U.S.C. § 1961(1) (1988).

214. 109 S. Ct. at 2900-01.

215. 473 U.S. at 496 n.14.

216. 109 S. Ct. at 2901-02. *See* Marshall-Silver Const. Co. v. Mendel, 894 F.2d 593 (3d Cir. 1990).

217. 109 S.Ct. at 2901.

218. *Id.* at 2902 (citing Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987)).

Court offered brief explanations of these concepts and suggested several methods for demonstrating a sufficiently continuous RICO pattern.[219]

Classifying continuous activity as either closed or open-ended signals whether continuity will be demonstrated by completed conduct or the threat of further criminal activity. Whether the alleged course of criminal behavior has been terminated or is ongoing, continuity may always be proven directly where a series of related predicates extends over a substantial period of time.[220] When an open and ongoing endeavor is presented, however, continuity might also be evinced by the threat of further racketeering activity.[221] Allowing such proof permits RICO to be invoked quickly without waiting for a sufficiently closed period of criminal conduct to transpire.[222]

This distinction between closed and open-ended conduct thus serves a useful purpose. Once the alleged pattern is properly classified, it can be scrutinized according to the appropriate method of proof. Nevertheless, some courts still analyze this question without reference to whether closed or open-ended conduct is present.[223] While this relaxed approach may be acceptable when a valid pattern is readily apparent, it will likely foster confusion and disarray in more complex cases.

1. *Closed Periods of Racketeering Activity*

A closed period of racketeering activity, as its name suggests, involves a course of criminal conduct which has been completed.[224] Although no further threat of racketeering is present, the events that have already transpired may be sufficient nonetheless to establish a RICO pattern.[225] By the literal dictates of *H.J. Inc*, the proper focus is upon the duration of the alleged predicate acts. Only "long-term criminal conduct," "over a substantial period," may constitute a pattern within a closed time frame.[226] In clarifying what long term means, the Court suggested only that predicate offenses lasting merely "a few weeks or months" would not be sufficient.[227] Precisely what a substantial period of time requires is left for the lower courts to determine on a case-by-case basis. Nevertheless, *H.J. Inc.*, read literally, limits the continuity analysis to a mere durational test when no threat of further racketeering activity is present. Several

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219. *See supra* notes 153-57 and accompanying text.

220. *H.J. Inc.*, 109 S. Ct. at 2902; *See also* Walk v. Baltimore and Ohio R. R., 890 F.2d 688, 690 (4th Cir. 1989) ("the sheer duration of criminal activity might demonstrate the requisite continuity . . . .").

221. *H.J. Inc.*, 109 S. Ct. at 2902. *See also* Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1273 (10th Cir. 1989); Service Eng'g Co. v. Southwest Marine, Inc., 719 F. Supp. 1500, 1508 (N.D. Cal. 1989).

222. *H.J. Inc.*, 109 S. Ct. at 2902.

223. United States v. Kaplan, 886 F.2d 536, 542-43 (2d Cir. 1989); Combs v. Bakker, 886 F.2d 673, 677-78 (4th Cir. 1989).

224. *See, e.g.*, Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986 (8th Cir. 1989); Sutherland v. O'Malley, 882 F.2d 1196 (7th Cir. 1989); Parcoil Corp. v. Nowsco Well Serv., Ltd., 887 F.2d 502 (4th Cir. 1989).

225. Walk v. Baltimore and Ohio R. R., 890 F.2d 688, 690 (4th Cir. 1989); Hutchinson v. Wickes Co., 726 F. Supp. 1315, 1319 (N.D. Ga. 1989). However, at least one court has misconstrued *H.J. Inc.* to require a "threat of continuing racketeering activity" in all circumstances. Halperin v. Jasper, 723 F. Supp. 1091, 1098 (E.D. Pa. 1989).

226. *H.J., Inc.*, 109 S. Ct. at 2902.

227. *Id. See supra* note 156 and accompanying text.

courts have closely followed this narrow approach and limited their inquiry to the length of time between predicate acts.[228]

This possible interpretation of *H.J. Inc.* appears, however, to violate the Court's own declaration that a natural and commonsense approach to RICO's pattern definition is required.[229] Obviously, the opinion must be read as a whole and against the backdrop of prior decisions of the Court. While useful, a mechanical accounting of the number of days between predicates cannot, in all instances, identify precisely those individuals Congress had targeted.

A simple hypothetical example demonstrates the incongruity of such a rigid approach: Suppose two dishonest entrepreneurs, A and B, operating rival businesses in the same town, independently embark on identical schemes to bribe city officials and procure government contracts. Because A is more expeditious than B, he completes his venture within a month. B, however, is more dilatory and spends over a year delivering her bribes to the same individuals. Both A and B receive a contract and quickly complete it, thus concluding closed periods of racketeering activity. No further threat of criminal conduct was evident. Under a literal reading of *H.J. Inc.*, A would not be indictable pursuant to RICO because his scheme did not extend over a substantial period of time. On the other hand, B would be amenable to the statute due only to her procrastination. Certainly, Congress did not intend that A's efficient completion of his scheme would by itself remove him from the reach of RICO. In his concurrence, Justice Scalia noted that this narrow approach which focuses only upon the time span between the predicate offenses will create a "safe harbor for racketeering activity that does not last *too* long, no matter how many different crimes and different schemes are involved . . . ."[230]

Rather than allow such an anomaly, courts should also assess non-durational factors when determining whether a closed period of criminal conduct constitutes a sufficient pattern of racketeering activity. These considerations include the number of victims, presence of separate and independent schemes, commission of varying predicate acts, and so forth.[231] Such an approach comports with language elsewhere in *H.J. Inc.* calling for flexibility.[232] Moreover, this reasoning furthers Congress' express desire to create a loosely defined statute free of loopholes.[233] Therefore, when a completed criminal endeavor involves predicate acts extending over less than a substantial period of time, continuity might be established by the existence of other factors indicating that such con-

228. *See, e.g.*, Fleet Credit Corp. v. Sion, 893 F.2d 441, 446-47 (1st Cir. 1990); Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc., 895 F.2d 971 (4th Cir. 1990); Rodriguez v. Banco Cent., 727 F. Supp. 759, 773 (D.P.R. 1989); Dooner v. NMI Ltd., 725 F. Supp. 153, 161-62 (S.D.N.Y. 1989); North Star Contracting v. Long Island R.R. Co., 723 F. Supp. 902, 906-07 (E.D.N.Y. 1989); Perez-Rubio v. Wyckoff, 718 F. Supp. 217, 241 (S.D.N.Y. 1989); West Mountain Sales, Inc. v. Logan Mfg. Co., 718 F. Supp. 1084, 1087 (N.D.N.Y. 1989); Obee v. Teleshare, Inc., 725 F. Supp. 913, 916 (E.D. Mich. 1989).

229. 109 S. Ct. at 2899.

230. *Id.* at 2908 (Scalia, J., concurring).

231. *See supra* notes 103-19 and accompanying text.

232. 109 S. Ct. at 2900.

233. *See supra* note 8 and accompanying text.

duct was not sporadic.[234] Such cases will be rare, however, and difficult to prove because a strong common-sense presumption exists against finding a pattern of criminal activity within a brief span of time.

This flexible multifactor approach to continuity is far more useful, however, in weeding out complaints alleging numerous predicate acts over a substantial period of time but still not involving long-term organized criminal conduct. While the existence of racketeering activity over a number of years may satisfy the continuity requirement, this is not always the case.[235] Several post-*H.J. Inc.* courts have employed non-durational considerations more as a means of disposing of such invalid RICO suits.[236]

Unfortunately, the federal judiciary already appears to be divided over this question of whether the continuity prong is necessarily satisfied by two or more predicates committed over a substantial period of time. The leading case in support of this position is *Fleet Credit Corp. v. Sion.*[237] In that action, ninety-five fraudulent letters were alleged to have been delivered via the U.S. Mail over a four and one-half year period creating a pattern of racketeering activity.[238] The First Circuit Court of Appeals felt obligated by *H.J. Inc.* to abandon its multifactor, fact-intensive balancing test and adopt the Supreme Court's bifurcated framework of relatedness and continuity.[239] Precisely why the panel believed these approaches were mutually exclusive is unclear. Nevertheless, the district court's decision dismissing the complaint was reversed and the case remanded.[240] The Court of Appeals held that allegations of multiple predicate acts over a substantial period of time was enough, by itself and notwithstanding

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234. *See, e.g.*, Polycast Technology Corp. v. Uniroyal, Inc., 728 F. Supp. 926, 948 (S.D.N.Y. 1989) (pattern found where numerous predicate acts extended over eight and one-half months in complex conspiracy).

235. Hutchinson v. Wickes Cos., 726 F. Supp. 1315, 1320 (N.D. Ga. 1989); *cf.* Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 994-95 (8th Cir. 1989) (relevant conduct lasted for over three years *and* involved multiple schemes, participants, victims, and a complex course of activity thus establishing a pattern).

236. *See, e.g.*, Menasco, Inc. v. Wasserman, 886 F.2d 681, 684-85 (4th Cir. 1989) (events took place over approximately a year but involved only one perpetrator, victim, and goal); Sutherland v. O'Malley, 882 F.2d 1196, 1203-05 (7th Cir. 1989) (relevant conduct extended over five months but involved only one scheme, victim, and economic injury.); Triad Assocs., Inc. v. Chicago Hous. Auth., 892 F.2d 583, 595-96 (7th Cir. 1989) (endeavor lasted for over two years but only one scheme was alleged, two transactions were involved, and one victim was injured by a single type of injury); Airlines Reporting Corp. v. Aero Voyagers, Inc., 721 F. Supp. 579, 584-85 (S.D.N.Y. 1989) (relevant acts occurred over thirteen months but there were merely three participants, one victim, and a single uncomplicated transaction); Disandro-Smith Assoc. P.C. v. Edron Copier Serv., Inc., 722 F. Supp. 912, 915-16 (D.R.I. 1989) (while spanning two years, conduct involved only the sale of three used copy machines); Hutchinson v. Wickes Cos., 726 F. Supp. 1315, 1320 (N.D. Ga. 1989) (although involving conduct over several years, acts alleged did not comprise a pattern due to the nature of the offenses); Benard v. Hoff, 727 F. Supp. 211, 215-17 (D. Md. 1989) (numerous predicate acts were extended over a period of nearly three years but conduct involved a single scheme with one goal and an isolated victim); Pyramid Sec. Ltd. v. Int'l Bank, 726 F. Supp. 1377, 1382-85 (D.D.C. 1989) (single scheme lasted three months and involved similar predicate acts, one victim, and a single economic injury); Cross v. Simons, 729 F. Supp. 588, 594-96 (N.D. Ill. 1989) (scheme covering a three and one-half year period attempted to defraud one victim and inflict a single economic injury through multiple acts of mail and wire fraud); Trundy v. Strumsky, 729 F. Supp. 178, 183-85 (D. Mass. 1990) (acts extended over nine months, at best, but there was only one victim, a single purpose, and an isolated injury); USA Network v. Jones Intercable, Inc., 729 F. Supp. 304, 316-18 (S.D.N.Y. 1990) (single uncomplicated scheme over three and one-half month period with few criminal acts, participants, and victims).

237. 893 F.2d 441 (1st Cir. 1990).

238. *Id.* at 444.

239. *Id.* at 445-46.

240. *Id.* at 448.

any other counterveiling non-durational factors, to satisfy the continuity requirement necessary for a RICO pattern.[241] Thus, the court interpreted *H.J. Inc.* as rendering irrelevant the uncontroverted fact that this was merely a single scheme by a lone perpetrator with one objective committing numerous identical acts of mail fraud and inflicting a single economic injury upon an isolated victim.

Chief Judge Campbell, writing for the unanimous panel, cited the Third Circuit's opinion in *Swistock v. Jones*[242] to support the proposition that a multifactor approach is no longer appropriate in light of *H.J. Inc.*[243] This reliance is misplaced as that decision merely reasoned that a single injury against a limited number of victims was not dispositive in favor of dismissing the complaint for failure to allege a sufficient pattern.[244] The *Swistock* panel did not purport, in any sense, to abandon all reference to non-durational factors when determining whether continuity is present within a closed period.

Indeed, in *Marshall-Silver Constr. Co. v. Mendel*, a subsequent panel of the Third Circuit expressly rejected the idea that patterns of racketeering activity may be discerned in such cases without considering non-durational factors.[245] The court noted that such a narrow examination would allow the continuity element to be satisfied by a limited number of predicates which happened to extend over a substantial period of time. This result would clearly be untenable where, for example, these offenses were all part of an isolated, uncomplicated scheme inflicting an isolated injury upon a lone victim.[246] The Third Circuit therefore refused to recogonize a bright-line rule validating all RICO complaints alleging predicate offenses sufficiently separated in time.

This more common-sense approach espoused in *Marshall-Silver Constr. Co.* is plainly preferable to the hard-and-fast standard employed in *Fleet Credit Corp.* Such a view is more consistent with *H.J. Inc.*'s desire for flexibility.[247] While the Supreme Court did declare that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this [continuity] requirement," this statement obviously does not foreclose the possibility that conduct sufficiently spread out in time might not be continuous either.[248] Proper evaluation of all relevant factors, durational and non-durational, will further Congress' goal of eradicating the long-term organized criminal offender.[249] Both Congress and the Supreme Court have consistently avoided injecting bright-line rules into federal RICO no matter how tempting. Accordingly, there is no valid basis for the proposition that a pattern exists

241. *Id.* at 447.

242. 884 F.2d 755 (3d Cir. 1989).

243. *Sion*, 893 F.2d at 446.

244. *Swistock*, 884 F.2d at 758-59.

245. 894 F.2d 593, 596-98 (3d Cir. 1990). This reasoning constitutes dicta, however, as the court concluded that even if continuity was defined solely in terms of duration, the seven month scheme alleged would still not withstand a motion to dismiss. *Id.* at 597.

246. *Id.* at 597.

247. 109 S. Ct. at 2900.

248. *See supra* note 156 and accompanying text.

249. *See, e.g.*, Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 883 F.2d 48, 51 (7th Cir. 1989). *See also supra* note 3 and accompanying text (purpose of federal RICO).

whenever two or more related predicated acts are committed over a substantial period of time. While highly indicative of continuous behavior, such factors are not necessarily dispositive.

The range of durational and non-durational factors potentially relevant to the question of whether continuity exists in a closed period of conduct is indeed broad. As similarly explained in the discussion of relatedness,[250] courts should examine any fact, event, or circumstance which tends to suggest that the series of criminal activities was not sporadic. Of course, no one factor is dispositive, requiring a case-by-case approach to the question of continuity.[251]

2. *Open-Ended Periods of Racketeering Activity*

In contrast to a closed period of racketeering activity, open-endedness exists when RICO is invoked prior to completion of the course of criminal conduct.[252] Continuity may be demonstrated at that point in either of two ways. First, two or more predicate acts may already have been committed permitting proof in a manner identical to that required for a closed period.[253] Alternatively, a plaintiff or prosecutor can establish continuity by establishing the existence of a threat of further racketeering activity.[254] Because an additional means of satisfying the continuity requirement is available when the alleged criminal conduct is open and ongoing, a RICO pattern is more likely to be found than in a closed and finite endeavor.

A RICO indictment or complaint is therefore properly characterized as open-ended when it sufficiently alleges a threat of further racketeering activity. Of course in the civil context, such pleadings must be founded upon "reasonable inquiry" and "grounded in fact."[255] Moreover, when fraud is alleged, as is common, the circumstances constituting such must be stated with particularity.[256] In a criminal application of RICO, expectations of responsible prosecutorial discretion act as an analogous check.[257] Properly employed, these safeguards should guarantee that closed periods of racketeering activity are not mischaracterized as open-ended.

Similarly, a defendant cannot convert his ongoing activities into a closed course of conduct by terminating his offensive operations once the threat of

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250. *See supra* notes 209-13 and accompanying text.

251. *H.J. Inc.*, 109 S. Ct. at 2902. *See also* Swistock v. Jones, 884 F.2d 755, 758 (3d Cir. 1989) (holding that infliction of a single harm on a limited number of victims was not dispositive in favor of dismissal).

252. *H.J. Inc.*, 109 S. Ct. at 2902.

253. *See id.* at 2906; Reeder v. Kermit Johnson, Alphagraphics, Inc., 723 F. Supp. 1428, 1435-36 (D. Utah 1989) (although criminal conduct alleged to be ongoing, such proof was not necessary as transpired events were already sufficient to establish a pattern).

254. *H.J. Inc.*, 109 S. Ct. at 2902. A complaint properly alleging a threat of further racketeering activity is therefore much harder to dispose of summarily. *See, e.g.*, Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 433 (5th Cir. 1990); Yellow Bus Lines, Inc. v. Drivers, Chauffers & Helpers, Local Union 639, 883 F.2d 132, 145 (D.C. Cir. 1989).

255. FED. R. CIV. P. 11. *See* Flannery v. IFA Inc., 722 F. Supp. 498, 501 (N.D. Ill. 1989).

256. FED. R. CIV. P. 9(b). *See* Manasco, Inc. v. Wasserman, 886 F.2d 681, 684 (4th Cir. 1989); Blake v. Dierdorff, 856 F.2d 1365, 1372 (9th Cir. 1988); Reinfeld v. Riklis, 722 F. Supp. 1077, 1083 (S.D.N.Y. 1989); Hutton v. Klabal, 726 F. Supp. 67, 71-72 (S.D.N.Y. 1989).

257. *Sedima*, 473 U.S. at 502-04 (Marshall, J., dissenting).

RICO emerges. Indeed, one purpose of allowing a demonstration of a threat of further racketeering activity is to avoid creating loopholes in RICO for clever individuals who abort their criminal schemes once the statute has been invoked. Thus, the threat of further racketeering may be discerned from the nature of the relevant conduct[258] and need not specifically exist at the moment RICO is instigated.[259] As already discussed, the Supreme Court suggested several methods by which such an allegation could be satisfactorily demonstrated.[260]

When the predicate offenses are closely related in time, RICO's pattern requirement can still be met, therefore, if a sufficient threat of racketeering activity can be shown. The Second Circuit Court of Appeals addressed the manner in which this may be accomplished just prior to the announcement of *H.J. Inc.* in *United States v. Indelicato.*[261] In a classic application of RICO against a traditional mobster, the only predicate acts alleged were the simultaneous murders of a mafia boss and his two associates.[262] Obviously, the closed interval between these offenses was extremely brief and did not constitute a substantial period of time in any sense. Nevertheless, the court held that facts external to these murders could demonstrate a sufficient threat of further criminal conduct and therefore satisfy the continuity requirement.[263] In that case, the nature of the enterprise, an organized crime family, and the defendant's intentions of assuming control of it by means of the three murders allowed the jury to infer that such a threat existed.[264] The Second Circuit felt no need to modify this analysis after *H.J. Inc.* was handed down.[265] Indeed, while the Supreme Court did not specifically cite *Indelicato*, it clearly affirmed that the nature of the defendant's conduct and the operation of the enterprise may indicate a threat of further racketeering activity.[266] Therefore, in determining whether a course of criminal conduct is sufficiently open-ended and ongoing to satisfy the continuity requirement, a court must examine every fact, event, and circumstance properly related to the predicate offenses.[267] If a substantial threat of further racketeering activity is present, a valid RICO pattern exists no matter how short the span between the predicate acts. Of course, the inquiry must be limited to whether a threat of racketeering activity exists and not simply further criminal conduct in general.[268] This approach avoids creating a loophole in RICO for racketeers who are engaged in long-term criminal activity but are only caught committing predicate offenses within a brief period of time, as in *Indelicato.* It also allows RICO to be used proscriptively without forcing a plaintiff or prose-

258. *H.J. Inc.*, 109 S. Ct. at 2902.

259. Minpeco, S.A. v. Hunt, 724 F. Supp. 259, 260 (S.D.N.Y. 1989); *accord* Sun Sav. & Loan Assoc. v. Dierdorff, 825 F.2d 187, 194 n.5 (9th Cir. 1987).

260. *Supra* note 157 and accompanying text.

261. 865 F.2d 1370 (2d Cir. 1989).

262. *Id.* at 1372.

263. *Id.* at 1382-84.

264. *Id.* at 1384-85.

265. United States v. Kaplan, 886 F.2d 536, 541-43 (2d Cir. 1989) (following *Indelicato*, 865 F.2d 1370). This approach was similarly adopted in United States v. Hobson, 893 F.2d 1267, 1269 (11th Cir. 1990).

266. *H.J., Inc.*, 109 S. Ct. at 2902.

267. *See supra* notes 209-13 and accompanying text.

268. Fleet Credit Corp. v. Sion, 893 F.2d 441, 448 (1st Cir. 1990).

cutor to wait until sufficient predicate offenses have been completed before invoking the statute.

VI. CONCLUSION

Given Congress' desire to avoid in RICO the exceptions and loopholes often created by bright-lines and strict rules, a precise definition of a pattern of racketeering activity is not possible. *H.J. Inc.* presents, nevertheless, a helpful discussion of what the term generally does and does not mean. Once courts begin applying this analysis uniformly on a case-by-case basis, much of the disorder and confusion that has troubled judges and commentators will begin to subside.

H.J. Inc. and subsequent case law have begun to reveal a consistent approach to the pattern requirement. A court must ask first whether two acts of racketeering activity exist. If so, it must then determine whether they are satisfactorily related. If those two conditions are met, a consideration of continuity is required. Every fact, event, and circumstance related to the predicate acts may be potentially helpful. A closed course of criminal conduct may be shown to be sufficiently continuous by demonstrating numerous participants or victims, several distinct injuries, different crimes, multiple schemes, or any other evidence indicating such conduct was not sporadic. While highly relevant, the time span between the predicate acts is not dispositive one way or the other. If continuity within a closed period cannot be shown, an open and ongoing endeavor may be established by a threat of further racketeering activity. An examination of the nature of the predicate offenses, enterprise, and defendant's conduct may reveal that such a propensity does exist. If, and only if, these requirements of two predicate acts, relatedness, and continuity are satisfied, a pattern of racketeering activity has been established.

Paul William Flowers